

Letter of Findings: 03-20182460
Withholding Tax
For the Years 2015, 2016, and 2017

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 requires the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Employer improperly paid withholding county taxes for employees. Employer is responsible for failure to properly withhold county tax.

ISSUE

I. Withholding Tax-County Income Tax Imposition.

Authority: IC § 6-3-4-8; IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-7-1; *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); [45 IAC 3.1-1-97](#).

Taxpayer protests the assessment of withholding tax on wages it paid to its employees.

STATEMENT OF FACTS

Taxpayer is a company with employees in Indiana. Taxpayer has many employees. Taxpayer's payroll program did not properly withhold county income tax. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and withholding tax returns for the 2015, 2016, and 2017 tax years. Taxpayer did not withhold Indiana state tax from its employees for the above stated years, and Taxpayer did not withhold county tax for the years 2015, 2016, and 2017. As a result, the Department issued proposed assessments for the withholding taxes as well as interest. Taxpayer protested the assessments. An administrative hearing was conducted, and this Letter of Findings results. Additional facts will be provided as necessary.

I. Withholding Tax-County Income Tax Imposition.

DISCUSSION

Taxpayer protests the assessment of withholding taxes on wages it paid to its employees for the 2015, 2016, and 2017 tax years. The Department based its imposition of withholding tax on its review of Taxpayer's records. The Department determined that Taxpayer owed the withholding taxes on the basis that Taxpayer had the duty to withhold those taxes as an employer. Taxpayer stated that they have high turnover and thought that they had properly withheld taxes for their Indiana employees.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-3-4-8(a) provides that employers must "withhold, collect, and pay over income tax on wages paid to. . . employees." The relevant regulation [45 IAC 3.1-1-97](#), states that employers must "withhold [F]ederal taxes pursuant to the Internal Revenue Code", and are also "required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax."

Taxpayer maintains that when it fails to withhold the tax, the Department should seek the tax from its employees

IC § 6-3-4-8 provides, in part, as follows:

(a) Except as provided in subsection (d), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, *shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department.* The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the taxpayer is subject to under [IC 6-3.5](#), and on the total amount of exclusions the taxpayer is entitled to under [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that [IC 6-3-1-3.5\(a\)\(3\)](#) and [IC 6-3-1-3.5\(a\)\(4\)](#) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

- (1) *shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section* and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly of the amount of tax which under this article and [IC 6-3.5](#) the employer is *required to withhold*.

(Emphasis added).

Accordingly, IC § 6-3-4-8(a) specifically requires an employer to "withhold, collect, and pay over income tax on wages paid by such employer to such employee . . . [in] the amount prescribed in withholding instructions issued by the department." IC § 6-3-4-8(a)(1) specifically provides that the employer is "liable to the state of Indiana for the payment of the tax *required* to be deducted and withheld." *(Emphasis added).* IC § 6-3-4-8 specifically provides that the employer is liable for the amount that it was *required* to withhold. These statutory requirements for the employer to withhold the amount prescribed in the Department's withholding instructions and for the employer to become liable for the amount it is required to withhold are restated in [45 IAC 3.1-1-97](#). "Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26) are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax." *Id.* The regulation then goes on to state, "In the case of delinquency or nonpayment of withholding tax, the employer is liable for such tax, penalties, and interest." *Id.*

Taxpayer asks for a reduction in its withholding tax liability by the actual amount that its employees paid in the employees' respective individual income tax returns attributable to the employees' given county. The returns provided by Taxpayer are not signed by the employee and are not verified.

In effect, Taxpayer is requesting that the Department perform individual income tax audits of certain employees to determine if the tax that it was required to pay was paid by the individuals and then relieve Taxpayer of its responsibility for withholding tax if individual employees did in fact report and pay the tax. For the Department to do what the Taxpayer requests, the Department would have to schedule individual audits with each of Taxpayer's employees, request copies of the employee's federal tax returns and other records, and then provide this employee's information about how much of the income was reported with the tax paid to Indiana to Taxpayer.

However, there is nothing in Indiana law which allows such treatment. Moreover, if the Department attempted to do as Taxpayer suggests, the Department would be violating the tax confidentiality requirements found in IC § 6-8.1-7-1(a) that prohibits the Department from sharing one taxpayer's information—i.e., the employee's tax information—with another taxpayer—i.e., the employer. Unlike the S-corporation withholding statute where the legislature has given the Department express authority, in IC § 6-3-4-13(i), for the shareholder's tax information to be shared with the S-corporation and to relieve the S-corporation of its withholding tax liability when the adjusted gross income tax has been paid by the shareholder, the Indiana legislature has not provided this remedy for employers with withholding tax liabilities.

Taxpayer was required to withhold county tax from its employees' pay pursuant to IC § 6-3-4-8. Thus, Taxpayer has not met its burden as required by IC § 6-8.1-5-1(c). Taxpayer's protest is denied.

FINDING

For the reasons stated above, Taxpayer's protest is denied.

April 8, 2019

Posted: 06/26/2019 by Legislative Services Agency
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